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March 16, 2009

Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Attn: Mabel Echols
Room 10102, NEOB
725 17th Street, NW
Washington, DC 20503
(Submitted electronically)

Re: Federal Regulatory Review

Dear Director:

On January 30, 2009, President Obama issued Executive Order 13497, revoking certain executive orders and returning the process of regulatory review by the Office of Management and Budget to that established by Executive Order 12866 (1993). At the same time the President issued a memorandum directing OMB in consultation with representatives of regulatory agencies to produce a set of recommendations for a new Executive Order within 100 days. 74 Fed. Reg. 5977 (Feb. 3, 2009). The memorandum stated that "in this time of fundamental transformation [the] process [of regulatory review] and the principles governing regulation in general should be revisited." OMB subsequently requested comments to assist it in developing a set of recommendations for the new executive order, including advice on "the principles and procedures governing regulatory review." 74 Fed. Reg. 8819 (Feb. 26, 2009).

The President's memorandum directs that the recommendations should, among other things:

- Offer suggestions for the relationship between [OMB's Office of Information and Regulatory Affairs] and the agencies;
- Provide guidance on disclosure and transparency;
- Encourage public participation in agency regulatory processes;
- Address the role of distributional considerations, fairness, and concern for the interests of future generations;
- Identify methods of ensuring that regulatory review does not produce undue delay;
- Clarify the role of the behavioral sciences in formulating regulatory policy; and
- Identify the best tools for achieving public goals through the regulatory process.

The apparatus of regulatory review has become clogged and stultified, straying far beyond the need for coordination and straying into a second policy-making operation engrafted on cabinet governance. OMB/OIRA have left their coordination role and become vehicles for second-guessing and revisiting decisions of the agencies, using processes that are not transparent. The following suggestions may improve a replacement Executive Order on regulatory review.

1. Drop the philosophy

Executive Order 12866, as currently framed, contains an explicit bias against regulation, articulating in Section 1(a) a "regulatory philosophy" that agencies should adopt "only such regulations" as are:

1. required by law
2. necessary to interpret the law, or
3. made necessary by "compelling public need," such as "material failures" of private markets to protect or improve public health and safety, the environment, or the well-being of the American people.

These limitations were artifacts of the Clinton administration's attempt to declare itself no friend of regulation. (President Reagan's E.O. 12291 did not have such a statement). But where Congress has granted regulatory authority, it is not good governance for OMB or the President to adopt a "philosophy" that so severely limits the conditions for regulation. Many federal statutes provide authority to regulate for the public good, and to set standards that improve efficiency or operations. For example, the Safe Drinking Water Act authorizes "such regulations as are necessary *or appropriate*" to carry out the Act. 42 U.S.C. §300j-9(a)(1). Regulation for the "public convenience and necessity" was one of the earliest forms of regulation. Regulations adopted under these and other statutory standards (e.g. multiple use/sustained yield for the public lands) may not meet the E.O.12866 "philosophy," but rather may be justified simply because they result in *improved administration and better outcomes.*

Section 1(a) of E.O. 12866 should be removed and not replaced. Limiting regulations to those that are required by law, interpretive regulations, and regulations necessitated by "compelling public need" does not properly describe the categories appropriate for use of regulatory means. In sum, there is no need for a "Statement of Regulatory Philosophy."

2. Implement limited principles, but include those articulated by Congress – viz. NEPA §102(1)

Regulation should be principled, but not founded on miscellany. E.O. 12866, § 1(b) provides a list of twelve "principles," reflecting various ideas of governance. This is far too many to be useful.

Some are common-sense provisions, such as the advice that an agency *examine* whether an existing regulation or law has created or contributed to a problem that a new regulation is intended to correct, and that agencies *examine* alternatives to direct regulation. §1(b)(2),(3).

These principles encourage thoroughness and care in the rulemaking process, and both may be retained.

But some "principles" attempt to drive substantive choices. For example, Principle 8 (§1(b)(8)) requires agencies to "specify performance objectives rather than" behavior or design standards to the "extent feasible." Yet such a driver might lead to regulations that even though "feasible", might impose greater administrative costs, needing more government-sponsored monitoring and oversight, or that require the acceptance of more risk. This is the kind of principle that does not belong in an executive order but that should remain within the judgment of the action agency. The choice of standard is the sort of matter that agencies should be left to weigh for themselves in light of statutory requirements, rather than enforced as a "principle" by OMB reviewers. Similarly, Principle 11 (§1(b)(11)) requires the agency to choose "the least burden on society" (whatever that may mean), "consistent with obtaining the regulatory objectives." The "least burden" formulation is not helpful or informative.

Looking to the President's January 30 Memorandum, it is apparent that transparency and public participation, and the role of distributional considerations, fairness, and concern for the interests of future generations are issues that should be considered. Fortunately, Congress has already provided guidance in these areas – articulating principles that are statutorily required, but not reflected in E.O. 12866. The National Environmental Policy Act of 1969 (NEPA) provides in §102(1) that "The Congress authorizes and directs that, *to the fullest extent possible*: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act," and identifies six discrete objectives for all federal "plans, functions, programs, and resources." § 101(b)(1)-(6).

> *1) responsibility for the future.*
> "Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."
>
> *2) environmental equity.*
> "Assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings"
>
> *3) beneficial use*
> "Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences"
>
> *4) historical, cultural, and biological diversity, and individual liberty.*
> "Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice."
>
> *5) widespread prosperity.*
> "Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities"
>
> *6) management for quality and conservation.*
> "Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

A principle for a new Executive Order should direct that agencies implement NEPA §102(1) in their consideration and development of regulations.

3. Limit OIRA review of regulatory actions in order to ensure effective cabinet governance

OMB/OIRA review of proposed and final regulations may be needed for three purposes:

> (1) to assess budget implications,
> (2) to avoid conflicts and unintended consequences of actions by separate departments and independent agencies, and
> (3) to ensure that the President is timely and meaningfully alerted to actions for which he is responsible.

However, beyond these three important purposes, OMB/OIRA review is not warranted as a further regulatory overlay. Too many regulations have undergone vigorous and public processes in accordance with their underlying statutes and the Administrative Procedure Act only to undergo non-public rewrites or indefinite deferral at OMB. Under E.O. 12866, §2(b) OIRA has become "the repository of expertise concerning regulatory issues" and has provided "guidance to agencies" not only on *general regulatory policy*, but also on the content of specific regulations. This provision has been interpreted in connection with §6 to set up an unnecessary and only poorly accountable administrative law apparatus atop the transparent and publicly accountable federal agency processes.

The main locus of federal regulatory review should be at the federal agencies themselves in accordance with the processes that they administer. OMB/OIRA's role should be to carry out the three functions above, not to apply a separate calculus of costs or benefits, or to take on evaluation of additional external advocacy. (The role of making sure that the President is apprised does offer a backstop to communications via the agency heads and allows for decisions about roll-out of a new rule or changes in direction at the President's behest.) OIRA review of proposed and final regulations should not delve into substantive review of the intended regulatory outcome.

There is a role for OMB and cabinet and executive working groups in determining general regulatory approaches or agendas *government-wide*. But on a rule-by-rule basis, the process should be streamlined, limited, and deferential to the expert agencies and the public processes they have used.

4. Abridge OIRA review and disallow external nongovernmental contact with OIRA

The President's January 30 memorandum stresses improving "disclosure and transparency," and "encourag[ing] public participation in *agency regulatory processes*" (emphasis added). But the elaborate OMB/OIRA review process not only subverted cabinet governance (see 3, above), but has led to interest groups and outside advocates attempting to influence outcomes at the stage of OMB review. This has undermined the equal playing field and public accountability created by the Administrative Procedure Act.

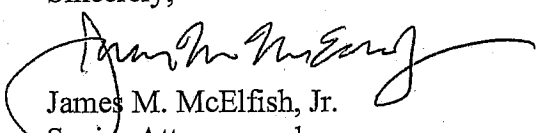
E.O. 12866 §6(b)(4) added limits and "disclosure" requirements to attempt to address the problem of nongovernmental input into regulatory review at OIRA. But there should be no place for such communication and pressure in the first place. External communications should be referred only to the agencies, and handled like any other comments and communications received outside a scheduled comment period. If the agency wishes to reconsider or reopen comment, then it should do so on the record. But "lobbying" of OMB has taken the cabinet agencies out of the process, and undermined public confidence in regulatory processes even with subsequent disclosure.

5. Restore CEQ to the list of advisors

Section 3(a) of E.O. 12866 defines a set of "advisors" with duties defined in Section 4 for planning and coordinating regulatory agendas and as participating in a Regulatory Working Group along with agency heads. If some kind of executive advisory group is continued, as it may be for setting broad regulatory policy, the Chair of the Council on Environmental Quality should be included (as was the case in E.O. 13258).

The Environmental Law Institute, a nonpartisan nonprofit organization organized in 1969 to advance environmental law and policy, has a longstanding involvement in administrative law and governance issues. Because of the importance of the Federal Regulatory Review executive order to the structure of environmental law and governance, within which future decisions will be made, I offer these comments – not on behalf of the Institute, but based on my experience with and review of regulatory decisionmaking over three decades in environmental law.

Sincerely,



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